In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SUGAR DADDY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, but only if a petition for a writ of certiorari is filed and granted in the case of *Adolph Weinberg, et al.* v. *Commissioner,* which involves the same judgment.

OPINIONS BELOW

The opinion of the Tax Court (R. 459–485) [1] is reported at 44 T.C. 233. The opinion of the court of appeals (Appendix, pp. 5–6, *infra*) is reported at 386 F. 2d 836.

[1] "R." references are to the record on review in the court of appeals.

297-717—68

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1967 (Appendix, p. 6, *infra*). On February 14, 1968, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including April 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Assuming *arguendo* that the court of appeals erred in holding that income from farming operations should be included in the income of two individual taxpayers rather than in the income of their twelve wholly owned corporations, whether the corporations are then entitled to one or to twelve surtax exemptions.

STATEMENT

This is a consolidated income tax case involving two individual taxpayers and their twelve wholly-owned corporations. The individuals claimed to have transferred growing farm crops on land they owned to the corporations, which allegedly sold the crops. The corporations reported the gains on the sales as corporate income. The Commissioner asserted deficiencies against the individuals on the ground that they, rather than the corporations, had realized the income. For protective purposes, the Commissioner also asserted deficiencies against the corporations, on the theory that if they realized the income, they were entitled to only one surtax exemption rather than the separate exemption each had taken.

The Tax Court upheld the Commissioner's determination that the individual taxpayers should have reported the income from the sale of the crops, and that the corporations therefore were not liable for tax on the income they had reported; it thus did not reach the Commissioner's alternative contention. *Weinberg, et al. v. Commissioner,* 44 T.C. 233. The individual taxpayers sought review in the Court of Appeals for the Ninth Circuit, and the Commissioner filed protective cross-petitions for review of the decisions in favor of the twelve corporations. On November 28, 1967, the court of appeals affirmed the Tax Court. The individual taxpayers sought rehearing; which the court denied on January 18, 1968. On March 31, 1968, Mr. Justice Douglas granted the individual taxpayers an extension of time until May 4, 1968, to petition for certiorari.

REASON FOR GRANTING THE WRIT

This petition is filed to protect the revenue in the event that this Court grants the petition for a writ of certiorari which we understand the individual taxpayers intend to file.[2] If the courts below correctly held, as we believe, that the proceeds from the sale of the growing crops should be included in the individual taxpayers' income, then those courts properly determined that the corporations were without any tax liability in the years involved. If, however, this Court were to rule that the individuals did not realize the income from the sale of the crops, then the Court

[2] The Commissioner intends to oppose any such petition.

should also restore that income to the taxpayers' twelve wholly-owned corporations and remand the case for determination of the alternate contention of the Commissioner which was not passed upon by the courts below—*i.e.*, that the corporations were entitled to only one surtax exemption.

CONCLUSION

If this Court should grant the petition for certiorari the individual taxpayers intend to file in *Weinberg* v. *Commissioner*, this petition should also be granted; but if certiorari is there denied, or no petition is filed, this petition should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 21213

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SUGAR DADDY, INC., ET AL, RESPONDENTS

ADOLPH WEINBERG, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SUGAR DADDY, INC., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

[November 28, 1967]

Petition to Review a Decision of the Tax Court of the United States

Before: BROWNING and ELY, Circuit Judges, and FOLEY, District Judge

PER CURIAM:

Taxpayers seek review of the decisions entered pursuant to the opinion of the Tax Court reported at 44 T.C. 233 (1965). The government concedes that the Tax Court erred in including income of E T Farming Company in the taxpayers' income. In all other respects we affirm the Tax Court's decision, on the ground that the Tax Court was not clearly wrong in

determining that the taxpayers failed to establish that they had transferred growing, unharvested crops to the taxpayers' twelve corporations rather than transferring to the corporations proceeds from the sale of those crops.

Remanded for recomputation under Rule 50 in accordance with this opinion.

U. S. Court of Appeals, San Francisco, Calif.

Filed: on Dec. 8, 1967

United States Court of Appeals for the Ninth Circuit

No. 21213

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SUGAR DADDY, INC., ET AL., RESPONDENTS

ADOLPH WEINBERG, ET AL., PETITIONERS

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SUGAR DADDY, INC., ET AL., PETITIONERS

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JUDGMENT

Upon Petition to Review a Decision of the Tax Court of the United States, ----------.

This Cause came on to be heard on the Transcript of the Record from the Tax Court of the United States, ---------- and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decisions of the said Tax Court of the United States in this Cause be, and hereby are affirmed in part and remanded to the said Tax Court for recomputation under Rule 50 in accordance with the opinion of this Court.

Filed and entered Nov. 28, 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1968